Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1994

FOSTER WHEELER ENERGY CORPORATION,
Petitioner,

v.

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON BEHALF OF FOSTER WHEELER ENERGY CORPORATION

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QUESTIONS PRESENTED

1. Whether the circuit court properly adopted *sua sponte* a new five-factor retroactivity test derived from *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail*"), to determine if the NLRB's decision in *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987) ("*Deklewa*"), should be applied retroactively in this case, rather than the tri-part test in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), applied by the district court to deny retroactivity.

2. Whether the circuit court created a split in the circuits and departed from accepted judicial proceedings by its application of the *Retail* five factors to reach a result contrary to the reasoning of every other circuit to consider the retroactivity of *Deklewa*, and by its failure to permit Foster Wheeler Energy Corporation any opportunity to present its case under the new test.

3. Whether *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), in sanctioning Section 301 suits to recover money damages "accrued" in the use of an 8(f) pre-hire agreement's referral system, also sanctioned, as the circuit court did here, the enforcement by arbitration of an 8(f) pre-hire agreement by a union that had not established its status as the collective bargaining representative by the choice of the majority of employees in an appropriate unit.

4. Whether it was a manifest injustice for the circuit court to apply a 1987 NLRB decision retroactively to enforce an 8(f) pre-hire agreement, with the net result of reversing the NLRB's 1985 final administrative determination when the General Counsel in three separate ULP charges involving the same dispute refused to issue complaint on the ground that the 8(f) pre-hire agreement was unenforceable by LIUNA as a collective bargaining representative.

5. Whether an employer can be compelled to arbitrate an alleged breach of an 8(f) pre-hire agreement for not utilizing the referral system of a local union, after the district court had determined that the referral system was discriminatorily operated in violation of both Federal and state law, and when the agreement expressly relieved the employer of its obligation to utilize the referral system if it were operated discriminatorily or in violation of either Federal or state law.

LIST OF PARTIES TO THE PROCEEDING

Petitioner Foster Wheeler Energy Corporation ("FWEC") is a wholly owned subsidiary of Foster Wheeler Corporation ("FWC"). Both FWEC and FWC were defendants in the original action, and cross-appellants in the proceeding below. FWEC does not have non-wholly owned subsidiaries.

Respondent Laborers' International Union of North America, AFL-CIO, was the plaintiff in the original action, and appellant in the proceeding below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON BEHALF OF FOSTER WHEELER ENERGY CORPORATION

Foster Wheeler Energy Corporation ("FWEC") hereby respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered on May 20, 1994.

CITATION OF OPINIONS BELOW

The opinion of the circuit court from which this petition arises, *Laborers' Int'l Union of North America, AFL-CIO v. Foster Wheeler Corp.; Foster Wheeler Energy Corp.*, Nos. 93-5208, 93-5233, 93-5243 (May 20, 1994), Appendix ("App.") 1a-72a, has not been officially reported. Unofficial reports appear at 146 LRRM (BNA) 2391 and 128 Labor Cas. p. 11,118 (3d Cir. 1994). The first decision of the district court directing the parties to arbitrate the 8(f) agreement, App. 105a-133a, is unreported. The decision of the circuit court denying FWEC's appeal of the direction to arbitration as premature, App. 168a-169a, is not reported. The district court's opinion accepting in part and rejecting in part the arbitrator's decision, and setting June 6, 1985 as the date of repudiation, App. 170a-205a, is not reported. The circuit court's decision reversing the district court and vacating the order to arbitrate, App. 210a-221a, is reported at 868 F.2d 573 (3d Cir. 1989). The district court's decision on remand and subsequent clarification rejecting the retroactive application of *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987) ("*Deklewa*"), enforced sub nom. *International Ass'n of Bridge Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988) ("*Iron Workers*"), pursuant to *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron*"), re-setting the repudiation date to August 9, 1985, and directing arbitration as to the issues of breach and damages, if any, App. 228a-286a, are not reported.

JURISDICTION

The judgment of the circuit court was entered on May 20, 1994. A timely Petition For Rehearing and Suggestion for

Rehearing En Banc filed by Petitioner was denied by the circuit court on July 8, 1994. App. 287a-288a. The circuit court granted a stay of mandate until August 15, 1994, App. 289a, and, as of August 16, 1994, FWEC's motion to extend the stay until August 22, 1994 remains pending. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions, set forth in full in the Appendix, are:

A. National Labor Relations Act ("NLRA"), as amended, Section 8(f), 29 U.S.C. § 158(f). App. 290a-291a.

B. Labor-Management Relations Act of 1947, ("LMRA") Section 301, 29 U.S.C. § 185. App. 291a-293a.

C. Code of Alabama, § 25-7-30 (1975). App. 294a.

STATEMENT OF THE CASE

FWEC, a wholly owned subsidiary of Foster Wheeler Corporation ("FWC"), was formed in 1974 to perform the manufacturing, engineering and construction activities involving electric power generation facilities that previously had been performed by its parent corporation. On April 20, 1982, FWEC and the Laborers' International Union of North America, AFL-CIO ("LIUNA"), entered into an NLRA

Section 8(f) pre-hire agreement (the "8(f) agreement").[1] App. 236a. Pursuant thereto, FWEC was obligated to hire employees through the referral system of the LIUNA local union having jurisdiction over the particular project. This obligation, however, was expressly conditioned upon the legal and non-discriminatory operation of the local referral system. App. 304a-305a.

In September, 1984, Energy Plant Constructors ("EPC"), FWC's merit shop construction arm, was awarded a contract to construct a sour gas purification plant at Bayou Jonas, Alabama.[2] The award to EPC and its intention to construct the project non-union were widely publicized. Indeed, in November, 1984, at a meeting with the Mobile County Commissioners, EPC plainly told a LIUNA Local 70 representative - the LIUNA local with jurisdiction over the Bayou Jonas project - that EPC did not consider itself bound by any labor agreement, and would staff the project through an on-site recruitment office rather than the Local 70 referral system. App. 247a-249a.

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[1] See *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-66 (1983)(Section 8(f) of the NLRA "allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority status first having been established in the manner provided for under § 9 of the Act").

[2] See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 506 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983) (citation omitted) ("union and non-union construction firms historically operated side by side by a single employer" is common in the industry, and "is not, without more, a violation of a collective bargaining agreement with the signatory construction firm").

From the onset of the project, LIUNA argued that FWEC's 8(f) agreement applied to the project. As alleged by LIUNA in its complaint:

> Since in or before October, 1984, a dispute has existed concerning the interpretation and application of the [8(f) agreement] with respect to FWC, FWEC, FWIC and EPC's failure to comply with each and every of the provisions of the Agreement on the [Bayou Jonas] Project.

App. 299a. In the following months, LIUNA lined up funding and prepared to sue FWEC for its failure to apply the 8(f) agreement at the Bayou Jonas project.[3] App. 306a-307a.

On April 9, 1985, LIUNA filed separate letter "grievances" with FWC, FWEC and EPC accusing each of failing to comply with the provisions of the 8(f) agreement at Bayou Jonas. App. 249a. EPC responded by letter dated June 3, 1985, expressly repudiating any collective bargaining agreements with LIUNA to which it may have been bound by operation of law, or otherwise. App. 249a-250a.

Beginning on May 3, 1985, FWEC exchanged several letters with LIUNA indicating its position that the 8(f) agreement did not and would not be applied at the Bayou

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[3] The circuit court's finding that LIUNA was deceived as to the applicability of the 8(f) agreement at the Bayou Jonas project is belied by LIUNA's actions which unequivocally indicate that at all times, LIUNA had intended to force the application of the 8(f) agreement at that project.

Jonas project. On August 9, 1985, FWEC wrote LIUNA again and stressed that the 8(f) agreement had been repudiated by FWEC insofar as it was alleged to apply at Bayou Jonas, citing the recent Eleventh Circuit decision in *Painters Local Union No. 164 v. Epley*, 764 F.2d 1509 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986) ("*Epley*") which expressly recognized, based on prior NLRB and Federal court decisions, that an employer had the right to repudiate an 8(f) agreement at any project at which the union had not established majority status. App. 249a-252a.

LIUNA then filed separate unfair labor practice ("ULP") charges on August 9, 1985 in three regional offices of the National Labor Relations Board ("NLRB") against FWC, FWEC, and EPC, respectively, alleging that their failure to apply the 8(f) agreement at Bayou Jonas violated Section 8(a)(5) of the NLRA. App. 254a. Each region refused to issue complaint and dismissed the charges, because, *inter alia*, the 8(f) agreement was unenforceable due to LIUNA's failure to establish majority status at Bayou Jonas. App. 73a-83a. LIUNA appealed the dismissals to the NLRB General Counsel's Office of Appeals, which affirmed the dismissals based on LIUNA's lack of majority status. App. 102a-104a.[4]

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[4] Additionally, EPC filed an employer's (RM) election petition for the Bayou Jonas project on July 17, 1985. After an evidentiary hearing, the Regional Director on November 18, 1985 concluded that there was "no evidence . . . has [LIUNA] represented a majority of the employees in an appropriate bargaining unit." App. 95a; see App. 252a-253a.

On August 29, 1985, LIUNA brought the instant Section 301 suit against FWC and FWEC, claiming that FWEC, FWC and EPC were alter egos such that the FWEC-LIUNA 8(f) agreement applied at the Bayou Jonas project. LIUNA requested that the court award damages rising from defendants' failure to use the Local 70 hiring hall to staff the project, and sought enforcement through arbitration of the 8(f) agreement. App. 301a-302a.

On December 9, 1985, the district court ruled that since the union had not demonstrated majority status in any appropriate unit, the agreement between LIUNA and FWEC was an 8(f) agreement, which could "be repudiated by either party at any time prior to the union establishing that it represents a majority of the employees in an appropriate bargaining unit." App. 109a-110a. The district court then reserved the issue of repudiation to itself, and compelled arbitration "solely on the question of whether the [8(f) agreement], construed *solely* as a Section 8(f) pre-hire agreement ever bound EPC to hire [LIUNA] members at the [Bayou Jonas] job site." App. 121a. FWEC and FWC appealed the district court's direction to arbitration, and in May, 1986 the circuit court dismissed the appeals as interlocutory. App. 168a-169a.

After the arbitration concluded, FWC and FWEC each moved in the district court to vacate the arbitrator's decision and for summary judgment that the 8(f) agreement had been repudiated before the first worker was hired at Bayou Jonas. LIUNA moved the district court to affirm the arbitrator's decision and for summary judgment that repudiation occurred on August 9, 1985. LIUNA subsequently requested that the district court reconsider its pending

motions in light of the NLRB's decision in *Deklewa* that had been issued shortly after the motions were filed. App. 230a.

In *Deklewa*, the Board reversed seventeen years of precedent to hold, among other things, that an 8(f) agreement could not be unilaterally repudiated during its term. 282 NLRB at 1377-78. Beginning with *R.J. Smith Constr. Co.*, 191 NLRB 693 (1971), enforcement denied sub nom. *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), and *Ruttmann Constr. Co.*, 191 NLRB 701 (1971), the Board had consistently held that 8(f) agreements were voluntary arrangements subject to repudiation by either party at any time for any reason prior to the union's establishment of majority status, an interpretation that had been approved by the Supreme Court, see *NLRB v. Local Union 103, Int'l Ass'n of Bridge Iron Workers, AFL-CIO*, 434 U.S. 335 (1978); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). The Board also held that it would apply the new *Deklewa* rule retroactively to "all pending cases." *Deklewa*, 282 NLRB at 1389.

The district court subsequently upheld the arbitrator's decision that the parties were bound to apply the agreement at Bayou Jonas. The court, however, refused to apply *Deklewa* to the present dispute (citing *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983)), and ruled on summary judgment that defendants had repudiated the 8(f) agreement on June 6, 1985 by virtue of EPC's June 3, 1985 letter. App. 181a-187a, 196a-197a.

Thereafter, the parties stipulated that the damages "arising under" the June 6 repudiation date amounted to $18,500, in order to permit LIUNA to appeal to the circuit court. App.

208a-209a. In February, 1989, the circuit court vacated the district court's decision and order to compel arbitration as well as all subsequent orders "predicated on the assumption that FWEC was FWC's alter ego." App. 220a. The circuit court succinctly summarized the issue remanded to the district court: "EPC is bound by the National Agreement as FWC's subsidiary only if FWC is itself bound by the [8(f) agreement], which applies to 'any person, firm or corporation owned or financially controlled by the Employer.'" App. 216a. The circuit court also stated that the district court "may reconsider" its decision regarding the applicability of *Deklewa* to the case at bar "in light of" that court's decision to enforce *Deklewa* in *Iron Workers*. App. 220a-221a. The court further noted that while defendant's contended repudiation had occurred substantially before June 6, 1985, LIUNA contended that if defendants could repudiate, they "did not do so until August 9, 1985." App. 212a.

In view of the relatively small amount of stipulated damages incurred as of the June 6, 1985 repudiation date (before many employees had been hired), and LIUNA's concession that if pre-*Deklewa* law applied defendants had repudiated on August 9, 1985 (establishing the parameters of any possible damage award), FWEC and FWC chose not to contest whether they were alter egos for purposes of the decision on remand, see App. 232a , thereby binding EPC as a principal to the 8(f) agreement at Bayou Jonas. Over the two-day evidentiary hearing that followed, the district court took evidence concerning the three *Chevron* factors to

determine if *Deklewa* should be applied retroactively in this case.[5] See App. 253a

In June, 1992, the district court concluded that pursuant to *Chevron*, it would not apply *Deklewa* retroactively to void defendants' lawful repudiation of the 8(f) agreement. App. 261a-271a. The court found, among other things, that LIUNA never obtained majority status on the project, and based on the testimony of the secretary-treasurer of LIUNA Local 70 in trusteeship, its referral system was illegally operated in violation of both Federal and Alabama state labor law.[6] App. 266a-267a; App. 248a-249a, n.39. The district

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[5] The *Chevron* criteria are as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Chevron, 404 U.S. at 106-07 (citations omitted).

[6] The circuit court apparently operated under the significant misconception that there was "no evidence in the record that LIUNA officials actually knew that the hall was being run illegally." App. 68a, n.30. The individual operating the referral system, however,

court also held that FWEC's August 9, 1985 letter effectively repudiated the 8(f) agreement, and that FWEC expressly relied on the Eleventh Circuit's decision in *Epley*. App. 264a-266a, 277a. The court directed the parties to attempt to settle based on the new repudiation date, and, if no agreement was reached, to notify the court that they "require judicial adjudication of that issue." App. 278a, n.46.

In August, 1992, LIUNA moved the district court to reconsider its decision not to apply *Deklewa* retroactively and to "clarify" its holding that the issue of damages, if unresolved, would be determined by the court. In March, 1993, the district court denied LIUNA's motion for reconsideration, but reversed its decision to reserve damage issues for judicial adjudication, and directed arbitration of the issue. App. 281a-284a. The court subsequently refused to entertain a motion by FWEC to reconsider its direction to arbitration, but clarified that the arbitrator would also address the issue of "whether there has been any breach of the agreement." App. 285a-286a.

Thereafter, LIUNA again appealed to the circuit court, and FWEC and FWC filed cross-appeals. In its opinion dated May 20, 1994, App. 1a-72a, the court (1) *sua sponte* determined that the *Chevron* test should not have been applied below, (2) substituted a five-part retroactivity test never utilized previously in that circuit, or by any court to address *Deklewa* retroactivity, and (3) without remand or any

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had been appointed by LIUNA as an officer of Local 70 in trusteeship. See App. 250a-251a, n.40.

briefing on the matter, utilized the new test to determine that *Deklewa* applied retroactively in this case. The circuit court also referred the issues of breach and damages, if any, to arbitration notwithstanding the decisions of three NLRB regional directors and the General Counsel's Office of Appeals refusing to issue complaint on the ground that the 8(f) agreement's grievance/arbitration provision was not enforceable because LIUNA lacked majority support in an appropriate unit.

REASONS FOR GRANTING THE PETITION

1. This Case is Appropriate For Supreme Court Review to Correct the Split Among the Circuits as to the Proper Standard to Apply to Determine the Retroactive Application of New Rules Announced in Administrative Adjudications.

This case squarely presents the issue of under what circumstances a new statutory interpretation announced by the NLRB in an administrative adjudication can be applied retroactively by Federal courts in subsequent Section 301 suits. The Supreme Court has addressed the retroactive application of judicial decisions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), and the retroactive application of statutes in *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994). The Supreme Court, however, has not spoken on the proper standard to apply to determine if a new rule announced in an agency adjudication, such as an NLRB proceeding which is not bound by the judicial strictures of stare decisis, should be

applied retroactively.[7] As a result, the tests applied vary both among and within the various circuits. This case is particularly illustrative of the dilemma facing litigants and is appropriate to address this issue because the circuit court actually adopted, *sua sponte*, a new retroactivity test that had not been previously utilized in that circuit, and had not been briefed or argued by any party.

In adopting a retroactivity test for new rules announced in administrative adjudications such as *Deklewa*, the circuit court expressly acknowledged that "not every court applies the same standard of review." App. 39a. For example, the Ninth Circuit in *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 895 F.2d 516, 519 (9th Cir. 1989), cert. denied, 498 U.S. 877 (1990), the Fifth Circuit in *United Bhd. of Carpenters Local Union 953 v. Mar-Len of La., Inc.*, 906 F.2d 200 (5th Cir. 1990), and the Seventh Circuit in *NLRB v. Bufco Corp.*, 899 F.2d 608, 609, 611-12 (7th Cir. 1990), analyzed *Deklewa* retroactivity under the *Chevron* test. The First Circuit in *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357-58 (1st Cir. 1990), addressed *Deklewa* retroactivity under a "manifest injustice" test citing *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). The Tenth Circuit also applied a "manifest injustice" test in *NLRB v. Viola Indus. Elevator Div., Inc.*, 979 F.2d 1384, 1396-97 (10th Cir. 1992). Although the Eighth Circuit apparently applied a manifest

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[7] *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), involved the direct judicial review of an SEC determination to retroactively apply a new rule to reject a proposed amendment to a plan for the reorganization of a public utility. It did not address the retroactive application in a subsequent case of a new rule announced in an administrative *adjudication*.

injustice test based on *Bradley* in *NLRB v. W. L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989) (citing *NLRB v. Monark Boat Co.*, 713 F.2d 355, 361 (8th Cir. 1983), citing *Bradley*), the court later, in *Ryan Heating Co. v. NLRB*, 942 F.2d 1287 (8th Cir. 1991), applied a three-part test resembling *Chevron*. The D.C. Circuit which issued the *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972) decision upon which the court below based its test, recently has acknowledged that it has applied a variety of tests to determine the retroactive application of administrative adjudications, see, e.g., *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993), *United Food Workers Int'l Union v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), including the *Chevron* test in *District Lodge 64 v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991).

Without Supreme Court direction, Federal courts will continue to adjust their separate tests, thereby forcing litigants to argue every conceivable retroactivity test in order to avoid the situation confronted herein by FWEC, in which the Third Circuit, *sua sponte*, picked a test out of a 1972 District of Columbia Circuit case that was no longer followed in that circuit and applied it to the voluminous record without the benefit of either argument or briefs.

2. The Circuit Court Departed from Accepted Judicial Proceedings by Basing its *Sua Sponte Retail* Analysis on Assumed Facts to Reach a Result Contrary to the Reasoning of Every other Circuit to Consider *Deklewa* Retroactivity, and by its Failure to permit FWEC any Opportunity to Present its Case Under the New Test.

Even if the circuit court properly reversed the district court by tailoring a retroactivity test for this case, it nevertheless departed from accepted judicial proceedings by its clear misapplication of the test to the facts. The court considered the following five factors to determine whether *Deklewa* should apply retroactively:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely occupies a void in an unsettled area of law, (3) the extent to which the party against whom the new holding is applied in fact relied on the former rule, (4) the degree of the burden imposed, and (5) the statutory interest in application of this new rule.

App. 43a (citation omitted). The court decided that the first and fourth factors were neutral, the third and fifth favored retroactivity, and the second did not. App. 43a.

The court's determination that the first factor is neutral, because this was not a case of first impression, cannot be squared with *Retail*, which indicated that this circumstance argued against retroactivity: "In short, some of the considerations which support retroactivity in cases of first impression are, in subsequent cases, absent from the scale on

which a court must weigh its decision." *Retail*, 466 F.2d at 391.

As to the third factor, actual reliance, the circuit court stated that the record "conclusively established" that defendants did not actually rely on pre-*Deklewa* law, because they had allegedly made their decision to repudiate before *Epley* gave them the right to repudiate the 8(f) agreement at a single job site. App. 48a. This rationale, however, at most establishes that FWEC, as held by the district court, did not "actually" rely on pre-*Deklewa* law until it expressly repudiated the agreement as to the Bayou Jonas project by letter dated August 9, 1985 in reliance on *Epley*.[8] The circuit court apparently disregarded this specific finding by the district court, because FWEC's letter had come "months after the defendants had fully committed themselves, both internally and contractually, to use non-union labor, and saddled themselves with that obligation by opening their own hiring hall (in January 1985) and hiring their workers from

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[8] The district court held:

> when FWEC finally notified LIUNA of its limited repudiation, *it explicitly relied* on *Painters Local 64 v. Epley*, 119 LRRM 3305 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986), a decision that had just been rendered by the Eleventh Circuit which had jurisdiction over Alabama where the [Bayou Jonas] project was located. . . . Accordingly, this court concludes that the defendants had a right to limit their repudiation to the [Bayou Jonas] project under the pre-*Deklewa* rule and that ***their reliance on Epley was reasonable***.

App. 264a-266a (emphasis added).

there (commencing on April 2, 1985) instead of from [LIUNA Local 70's] hiring hall." App. 48a.[9]

There is *no evidence* in the record that defendants were bound to continue to use nonunion labor at Bayou Jonas, contractually or otherwise, as of August 9, 1985, or at any time before. Indeed, since LIUNA had argued that if pre-*Deklewa* law applied, the defendants had repudiated the agreement on August 9, 1985, this issue was not even properly before the circuit court. There is *no evidence* in the record, nor argument by LIUNA, that if in the purely hypothetical situation *Deklewa* had been in place in 1984, defendants nonetheless would have hired merit shop and consciously incurred potential liability to pay twice for the same work. FWEC's obvious reliance on pre-*Deklewa* law was its decision that additional action was unnecessary.

Further, if *Deklewa* had been the law at the time, defendants could have pursued the RM election petition filed by EPC to a full conclusion, rather than permit it to lapse as moot after project completion because even under *Deklewa*, an employer can cancel an 8(f) agreement by a Board election in which the employees did not support the union. FWEC never had an opportunity to pursue this important part of the *Deklewa* non-repudiation rule balance.[10] If

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[9] The circuit court perversely reasons that FWEC's acts in repudiation of the 8(f) agreement, such as its refusal to apply any part of the 8(f) agreement, are evidence that it did not rely on its right to repudiate.

[10] Additionally, if *Deklewa* had been the law at the time, the three regional directors would have issued complaints to enforce the 8(f) agreement, instead of dismissing them and thereby leading FWEC to believe no further action was required. Patently, FWEC relied on

Deklewa cannot be applied retroactively in full in this case, it should not be applied retroactively at all.

As to the fourth factor, the degree of burden imposed by retroactivity, the circuit court held that regardless of the amount of potential liability to be incurred by FWEC, "[c]ounterbalancing this fact is the defendants' great size and considerable wealth, as financial fortitude blunts the blow of damages" so that "this inconclusive factor might favor either side." App. 46a. At oral argument, LIUNA alleged that damages would be in "seven figures." Regardless of unsupported assumptions of defendants' "financial fortitude," a claim for a seven-figure damage award is clearly a significant burden, and in this case would represent a penalty for taking action lawful at the time. On the other hand, applying pre-*Deklewa* law would impose *no burden* on LIUNA which would simply be getting the exact same agreement that it negotiated in 1982, an agreement subject to repudiation by either party at any time absent demonstrated majority status.[11] See *Deklewa*, 282 NLRB at 1378.

The circuit court decided that it was bound by its decision in *Iron Workers* to rule that the fifth factor, "the statutory

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the same pre-existing Federal court and NLRB law to oppose issuing complaint in these three ULP charges that the regional directors themselves relied on in dismissing the charges.

[11] The circuit court's reasoning as to the fourth factor is internally inconsistent. On one hand it reasons that the fourth factor militates in favor of retroactive application because the potential financial burden on defendants would be insubstantial, in the range of $20,000.00, and on the other hand holds that the amount of this burden "is of little concern." App. 45a-46a.

interest in application of this new rule," favored retroactive application. App. 45a, n.15. This holding, however, is contrary to the court's ruling that retroactivity must be analyzed case by case, App. 27a, which required the court to independently determine whether the statutory interests were furthered by retroactive application *in this case*.

As the circuit court acknowledged, "many courts have stressed that applying *Deklewa* retrospectively to a dispute of purely historical interest does not further the interests which the new rule was fashioned to advance, namely, labor stability and employee freedom of choice." App. 45a, n.15.[12] Thus, as in the footnoted cases, the Bayou Jonas project was completed by June, 1987, so that employee free choice, the primary element in 8(f) cases, could not be served by retroactive application in this case. Similarly, labor relations stability would not be served because EPC had been inoperative since 1987, FWEC had terminated each § 8(f) national construction agreement by the end of 1987

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[12] See, e.g., *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 358 (1st Cir. 1990) ("In cases in which there was no representation election still to be held and where the dispute was purely historical, the policies of labor stability and employee free choice would not be served by applying Deklewa to past conduct"); accord, *United Bhd. of Carpenters Local Union 953 v. Mar-Len of La., Inc.*, 906 F.2d 200, 203 (5th Cir. 1990); *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 895 F.2d 516, 519 (9th Cir. 1989), cert. denied, 498 U.S. 877 (1990); *Trustees for Mich. Laborers Health Care Fund v. M.M. Vander Veen Constr. Co.*, 736 F. Supp. 138, 142-43 (W.D. Mich. 1989); *Trustees of the Nat'l Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731 (D. Md. 1988); *Construction Indus. Welfare Fund v. Jones*, 672 F. Supp. 291, 294 (N.D. Ill. 1987).

and no longer performed construction work, and no other FWC subsidiary held any national prehire agreement.

Indeed, the circuit court's application of the *Retail* test - which no other court has utilized to examine *Deklewa* retroactivity - to determine that *Deklewa* should be applied retroactively in this case was directly contrary to the reasoning of every other circuit court to consider the issue. Regardless of the precise test applied by these courts, each determined that if the employer repudiated the 8(f) agreement under the well established law prior to *Deklewa*, it would not apply *Deklewa* retroactively to effectively penalize the employer for choosing a course of conduct that was fully within its rights under law at the time. *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 895 F.2d 516 (9th Cir. 1989), cert. denied, 498 U.S. 877 (1990); *United Bhd. of Carpenters Local Union 953 v. Mar-Len of La., Inc.*, 906 F.2d 200 (5th Cir. 1990).[13]

Further, in each case that a court has purportedly applied *Deklewa* retroactively to prohibit repudiation, including *Iron*

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[13] Accord *Northern Cal. Dist. Council of Laborers v. Strauss Constr. Co.*, 672 F. Supp. 430 (N.D. Cal. 1987), aff'd, 897 F.2d 533 (9th Cir. 1990); *Construction Indus. Welfare Fund v. Jones*, 672 F. Supp. 291 (N.D. Ill. 1987); *Sheet Metal Workers Local #312 v. Action Enters., Inc.*, 136 LRRM 2743 (D. Utah 1987); *Trustees of the Nat'l Automatic Sprinkler Indus. Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731 (D. Md. 1988); *Trustees for Mich. Laborers Health Care Fund v. M. M. Vander Veen Constr. Co.*, 736 F. Supp. 138 (W.D. Mich. 1989).

Workers/Deklewa, the employer had been prohibited from repudiating under pre-*Deklewa* law by the union's establishment of majority status. In effect, *Deklewa* has been applied *solely* prospectively. *NLRB v. W.L. Miller Co.*, 871 F.2d 745 (8th Cir. 1989); *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990); *Iron Workers*, *supra*.[14]

Indeed, in *Miller*, the Eighth Circuit took pains to distinguish cases in which the union could not demonstrate majority status:

> There were obviously some situations where a Union signatory did not enjoy anything close to majority status, and the possibility of conversion was therefore remote. When two parties negotiate at arm's length, both aware that the law currently permits repudiation of any contract they make unless certain events occur, the probability of those events happening will influence the terms of the contract. Applying *Deklewa* to a situation such as this would "undermine the prior contract between the parties", and create a windfall for the union by holding the employer to terms that would never have been agreed upon if the *Deklewa* rule were anticipated.

871 F.2d at 749 (citation omitted). Similarly, in *Iron Workers*, the Third Circuit emphasized that the union had achieved majority status:

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[14] The circuit court distinguished this significant body of Federal jurisprudence on the basis that these courts had applied different standards of review. App. 39a. Under the circuit court's decision, therefore, a court can avoid all prior Federal retroactivity jurisprudence simply by altering the retroactivity test in each case.

> The factors which would have established the multi-employer unit of employees as having obtained majority status plainly appear on the stipulated record submitted by the parties to the Board and which is before us now. Thus, even under the old *R.J. Smith* rule it appears entirely likely that the Board would have held that Deklewa was not free to repudiate its agreement with the Union.

843 F.2d at 781.

The circuit court's claim, therefore, that there was a split in the circuits on the retroactivity of *Deklewa* prior to this case is inaccurate. See App. 36a. The Supreme Court denied certiorari in *Iron Workers*, where the Third Circuit had affirmed the Board's *Deklewa* decision because it would not be a manifest injustice to impose no greater liability on a party than would have been imposed under pre-*Deklewa* law. Obversely, the Supreme Court denied certiorari in *Mesa Verde*, where the court below ruled against retroactivity because the repudiating party was not bound under the pre-*Deklewa*/*McNeff* rules due to the union's lack of majority support at the time of repudiation. It clearly would have been a manifest injustice to apply the new *Deklewa* rules retroactively in that case. FWEC is entitled to the same protection from "ex post facto" penalization for having followed the law as stated by the Court in *McNeff*, that has been afforded to the employers in *C.E.K.*, *Mesa Verde*, and *Mar-Len*, *supra*.[15] This case calls out for

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[15] A reversal on the issue of retrospective application of *Deklewa* would require determination as to how much earlier than August 9, 1985, FWEC had repudiated the agreement. FWEC has maintained

judicial relief from a circuit court decision that departs from accepted judicial procedures and functions.

Lastly, and perhaps most unsettling, the circuit court adopted this five factor test *sua sponte* sometime after oral argument so that FWEC ***never*** had an opportunity to present its case under these new factors. Since the circuit court's arguments and reasoning were predominantly its own (LIUNA argued for retroactivity under *Chevron*), FWEC improperly has been denied any opportunity to respond to the court's allegations against it. As held by the Court in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation omitted): "A fundamental requirement of due process is 'the opportunity to be heard'. . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

3. Pursuant to *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), Only the Economic Terms Under which the Employees were Referred and Hired are Enforceable in a Section 301 Action.

In *McNeff*, the Court held that "monetary obligations" that had "accrued" under an 8(f) agreement could be enforced in a Section 301 suit brought prior to the repudiation of such contract, absent proof that the union

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repudiation occurred before the first employee was hired at Bayou Jonas. See, e.g., *Eastern Dist. Council v. Blake Constr. Co.*, 457 F. Supp. 825 (E.D. Va. 1978); *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 681 F.2d 1, 9 & n.38 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983) (discussing manner of repudiation).

represented a majority of the employees. 461 U.S. at 272. The Court, however, carefully distinguished monetary obligations accrued by the employer through its acceptance of the benefits of the agreement, "[h]aving heard the music, he must pay the piper," from acts which relate to the union's representational status. *Id.* at 271; see *id.* at 269 ("[E]nforcement of accrued obligations in a § 301 suit does not mean that the union represents a majority of the employer's employees"). A non-majority union is without the representational rights under § 9(a) of the Act which authorizes it to represent employees in the enforcement of a § 9(a) collective bargaining agreement's provisions through grievance/arbitration or otherwise.[16] Therefore, the circuit court below was not correct in concluding that the 8(f) agreement's broadly phrased arbitration clause automatically made it fully enforceable through grievance/arbitration absent the union having established its status as the employees' collective bargaining representative in an appropriate unit, and, indeed, is the only court ever to have

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[16] The Eleventh Circuit in *International Bhd. of Elec. Workers, Local 613 v. Fowler Indus., Inc.*, 884 F.2d 551, 554 (11th Cir. 1989), explained *McNeff* to have held that the determination of union majority representation in an appropriate unit was not a prerequisite to a union's action in a Section 301 suit to recover accrued money damages arising from the employer's use of an 8(f) agreement. The 8(f) agreement, however, does not give the prehire union the right to maintain an action based on its status as the exclusive bargaining representative for a group of employees until the union achieves majority status in an appropriate unit. Here, LIUNA has not claimed that the Section 301 suit was brought on behalf of the individuals employed at Bayou Jonas, but rather only on behalf of Local 70's members, none of whom had been referred by Local 70 to work at Bayou Jonas.

directed arbitration under an 8(f) agreement absent establishment of union majority status.

Additionally, the Court in *McNeff* held, and only held, that accrued damages can be recovered in a § 301 suit if the complaint had been filed before repudiation, 461 U.S. at 271-72, which did not occur in this case. Defendants also have heard no "music." The 8(f) agreement was never utilized, and could not have been legally utilized due to LIUNA's unlawfully discriminatory referral system that was determined by the district court to violate both Federal and state law. An action in the district court to secure accrued monetary damages must be within the limitations explained in *McNeff*.

4. By Directing Arbitration Notwithstanding LIUNA's Lack of Majority Status, the Circuit Court Reached a Result Exactly Opposite to the NLRB's Final Administrative Determination of the Same Dispute Involving the Same Parties Under the Same 8(f) Agreement.

On August 9, 1985, approximately three weeks before bringing this § 301 suit, LIUNA filed unfair labor practice charges in three separate NLRB Regions seeking to enforce the grievance/arbitration provisions of the 8(f) agreement. After an investigation, each regional director separately concluded that LIUNA could not demonstrate majority status at Bayou Jonas, and therefore, could not enforce the 8(f) prehire agreement by grievance/arbitration. App. 73a-83a. LIUNA appealed the dismissals to the NLRB General Counsel's Office of Appeals, which dismissed the appeals on the basis that LIUNA's lack of majority status precluded it from enforcing the 8(f) agreement. App. 102a-104a; see

also App. 252a. The circuit court's decision to compel arbitration despite the contrary NLRB final administrative determination impermissibly infringes on the province of the NLRB, and serves only to encourage forum shopping and wasteful duplicative litigation.

The circuit court also asserted that even if it were not an unfair labor practice under pre-*Deklewa* law for FWEC to repudiate an 8(f) agreement, it would not be precluded from finding in a Section 301 case that repudiation was a breach of that agreement. App. 51a-52a, n.21. This expansive dicta, which encourages unnecessary protracted litigation by enabling litigants to simultaneously pursue the same claim in two separate forums with no preclusive effect,[17] underscores the importance for the Supreme Court to grant the Writ and address this issue.

Lost in the circuit court's labyrinthine analysis of the five-factor *Retail* retroactivity test is that it has directed FWEC to do what LIUNA had unsuccessfully tried to have the NLRB make defendants do by having complaints issued

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[17] See *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 657 F.2d 806, 812-13 (5th Cir. 1981) ("We acknowledge that neither *Higdon* nor *Haberman* directly dealt with the question of the nonenforceability of a prehire agreement as a defense to a breach of contract suit; these cases are not, therefore, squarely in point. But this distinction makes no difference. If the goal is the maintenance and insurance of *employee* free choice, it matters not whether the sword dangling above the employer's head is an unfair labor practice charge or a breach of contract suit. The direction of the pressure is the same -- toward treatment of a nonmajority union as the employee's agent for collective bargaining").

against them to test whether the 8(f) agreement was enforceable and this dispute arbitrable. The agency decided with finality within its internal procedures that this agreement was not enforceable and this dispute was not arbitrable. The NLRB limited *Deklewa* to "pending" cases, and did not intend for Federal courts to re-examine its previous decisions.[18] No other Federal court has applied *Deklewa* retroactively in a case in which the NLRB General Counsel has refused to issue complaint on the ground that the 8(f) agreement was not enforceable due to the union's lack of majority status in an appropriate unit.

The net result of the circuit court's new retroactivity analysis is to have retroactively applied the NLRB's *Deklewa* decision to reach a result that the NLRB had previously refused to reach in the same dispute. The NLRB could not apply its 1987 *Deklewa* decision to the 1985 relationship between the parties. It is respectfully submitted that the circuit court departed from accepted judicial procedures when it refused to follow the Supreme Court decision in *McNeff* that was applicable in 1985, to a case not subject to *Deklewa* retroactivity.

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[18] In order for a case to have been pending at the time of the *Deklewa* decision, an NLRB regional director (the General Counsel) would have had to have issued a complaint. Under *McNeff* and pre-*Deklewa* law, a regional director could not have issued a complaint unless the union first had demonstrated majority status. The *Deklewa* case in 1987 was pending before the Board only because the parties had stipulated that the union had the majority support in an appropriate unit.

5. The District Court's Finding That LIUNA Operated an Illegally Discriminatory Referral System Precludes, as a Matter of Law, Any Finding That FWEC Breached the 8(f) Agreement by Failing to Use Such Illegal Procedures to Staff the Bayou Jonas Project, Thereby Rendering Moot the Issues Referred to Arbitration.

The district court concluded that at all times relevant, LIUNA Local 70 in trusteeship to LIUNA:

> [U]tilized a discriminatory referral system which clearly favored union members above non-union members. Since both federal and state law required referrals without regard to union affiliation, see 29 U.S.C. § 158(a)(3),(b)(2); Alabama Code Section 25-7-30, LIUNA's affiliate was essentially operating an illegal hiring hall.

App. 267a.

Based on this finding, neither a district court nor an arbitrator could thereafter conclude that FWEC had to use that hiring hall and thereby violate both Federal and state labor statutes. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) ("[c]learly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law" (and, for that matter, under Federal law as well)); see also *Laborers' Int'l Union of North America, Local No. 107 v. Kunco, Inc.*, 344 F. Supp. 626, 630-31 (W.D. Ark. 1972), rev'd on other grounds, 472 F.2d 456 (8th Cir. 1973) ("There can be no enforceable contract of such nature under Arkansas law . . . Since there is no enforceable contract, then no possible

damage can result from breach thereof and no suit for damages can possibly be stated, therefore the complaint for damages should be dismissed.").

Moreover, the express and unambiguous terms of the 8(f) agreement relieved FWEC of any obligation to utilize the local LIUNA referral system if it were unlawfully operated.[19] Consequently, the issues of breach and damages are moot based on the district court's undisturbed finding that LIUNA maintained and operated an illegal hiring hall.

CONCLUSION

For all the foregoing reasons FWEC respectfully submits that a Writ of Certiorari should issue.

Respectfully submitted,

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[19] The 8(f) agreement provides in Article V, Hiring, Section 1: "The Employer agrees to comply with local area referral and hiring procedures contained in the local Laborers' agreement, *provided* such procedures meet state and federal laws and are not inconsistent with the terms of this Agreement." App. 304a (emphasis added). Article XV further limits an arbitrator's decision solely to the provisions of the agreement. App. 305a.